ANNOTATED
PROCEDURAL RULES FOR THE
DIVISION OF HEARINGS

(Updated February 9, 2011)

In 1984, the Natural Resources Commission adopted procedural rules to assist in its implementation of Indiana's "administrative adjudication act" (formerly IC 4-22-1). There have since been numerous amendments to the rules, including major revisions in 1988 to reflect the enactment by the Indiana General Assembly of the "administrative orders and procedures act" (IC 4-21.5). In 1996, the rules were recodified at 312 IAC 3-1. The Commission adopted amendments to apply the rules to administrative review from the Indiana Board of Licensure for Professional Geologists in 1998 and from the Indiana Board of Registration for Soil Scientists in 2002. Readoption by recodification of 312 IAC 3-1 was performed in 2002 and again in 2008, but in neither instance were any language changes made. The procedural rules are set forth below with annotations to provide a brief history of each section, together with judicial or administrative law interpretations. The annotations are unofficial and intended only for the convenience of parties or their attorneys.

312 IAC 3-1-1 Administration

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 4-21.5; IC 14; IC 25-17.6

Sec. 1. (a) This rule controls proceedings governed by IC 4-21.5 for which the commission, or an administrative law judge for the commission, is the ultimate authority. In conjunction with 315 IAC 1-1, this rule also governs a proceeding consolidated with the office of environmental adjudication under IC 14-10-2-2.5(b).

(b) An affected person who is aggrieved by a determination of:

(1) the director;
(2) a delegate of the director;
(3) a board (other than the commission when acting as the ultimate authority);
(4) a delegate of the board (other than an administrative law judge);
(5) a person who has been delegated authority under 312 IAC 2-2;
(6) the Indiana board of licensure for professional geologists under IC 25-17.6; or
(7) the Indiana board of registration for soil scientists under IC 25-31.5;

may apply for administrative review of the determination under IC 4-21.5 and this rule.

(c) As used in this rule, "division director" refers to the director of the division of hearings of the commission. *(Natural Resources Commission; 312 IAC 3-1-1; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Oct 19, 1998, 10:12 a.m.: 22 IR 748; filed Aug 29, 2002, 1:03 p.m.: 26 IR 7; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA; filed Apr 3, 2009, 2:00 p.m.: 20090429-IR-312080688FRA)*

Annotation: In 1996, the section reorganized former 310 IAC 0.6-1-1 and 310 IAC 0.6-1-2 and added new language. In 1998, application was extended to the Indiana Board of Certification (now "Licensure") for Professional Geologists. In 2002, application was extended to the Indiana Board of Registration for Soil Scientists. In 2009, application was extended to a consolidated proceeding with the Office of Environmental Adjudication under IC 14-20-2-2.5 and 312 IAC 3-1-10.5.

This multi-section rule (312 IAC 3-1) was adopted by the Natural Resources Commission to assist in its implementation of the administrative orders and procedures act (IC 4-21.5). *Gardner v. Taggert*, 7 Caddnar 192 (1997) and *Hoosier Environmental Council v. DNR and Vigo Coal Company*, 8 Caddnar 13 (1997).

312 IAC 3-1-2 Ultimate authority

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 4-21.5-4; IC 14-34-4-13; IC 14-34-15-7; IC 25-17.6; IC 25-31.5

Sec. 2. (a) Except as provided in this section, the commission is the ultimate authority for the department and any department board.

(b) Except as provided in subsection (d), an administrative law judge is the ultimate authority for an administrative review under the following:

(1) An order under IC 14-34, except for a proceeding:

(A) concerning the approval or disapproval of a permit application or permit renewal under IC 14-34-4-13; or

(B) for suspension or revocation of a permit under IC 14-34-15-7.

(2) An order granting or denying temporary relief under IC 14-34 or an order:

(A) voiding;

(B) terminating;

(C) modifying;

(D) staying; or

(E) continuing;

an emergency or temporary order under IC 4-21.5-4.

(3) An order designated as a final order in section 9 of this rule.

(c) An administrative law judge is also the ultimate authority for the following:

(1) The Indiana board of licensure for professional geologists under IC 25-17.6.

(2) The Indiana board of registration for soil scientists under IC 25-31.5.

(d) For a proceeding consolidated with the office of environmental adjudication under IC 14-10-2-2.5(b), the panel described in IC 14-10-2-2.5(c) is the ultimate authority for administrative review. *(Natural Resources Commission; 312 IAC 3-1-2; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Oct 19, 1998, 10:12 a.m.: 22 IR 749; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1543; filed Aug 29, 2002, 1:03 p.m.: 26 IR 8; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR- 312080052RFA; filed Apr 3, 2009, 2:00 p.m.: 20090429-IR-312080688FRA)*

Annotation: In 1996, the section reorganized former 310 IAC 0.6-1-2.5 and added new language. In 1998, the section clarified that an administrative law judge is the ultimate authority for any final order issued under 312 IAC 3-1-9. Amendments in 1998 reflected an administrative law judge is the ultimate authority for the Board of Licensure of Professional Geologists, and amendments in 2002 reflected the same role for the Board of Registration for Soil Scientists. Amendments in 2009 acknowledged the panel described in IC 14-10-2-2.5 is the ultimate authority for a consolidated proceeding with the Office of Environmental Adjudication. Technical amendments clarified the role of the administrative law judge as the ultimate authority for temporary relief under IC 14-34 and for an action relative to an emergency or temporary order under IC 4-21.5-4.

The Commission is the ultimate authority for administrative review of an action under the Lakes Preservation Act (IC 14-26-2). The Commission is the ultimate authority for administrative review of an action under the flood control act (IC 14-28-1) and the navigable waters act (IC 14-29-1). *Krovocheck v. DNR, City of Lawrenceburg, et al.*, 8 Caddnar 3 (1996). The Commission is the ultimate authority for a determination by the DNR Director to declare, or not to declare, a groundwater emergency under IC 14-25-4. *Garvin v. DNR and Silver Creek Sand and Gravel*, 8 Caddnar 8 (1997). The Commission is the ultimate authority for a complaint by a landowner against a timber buyer filed under IC 25-36.5-1-3.2. *Cowper v. Collier Timber, et al*., 7 Caddnar 175 (1997).

The administrative law judge is the ultimate authority for administrative review of a notice of violation (NOV), including an NOV alleging a violation of blast limitations, under the surface coal mining law (IC 14-

34). The administrative law judge is the ultimate authority for a cessation order (CO) issued under the surface coal mining law (IC 13-4.1, since recodified as IC 14-34). *Hoesli, et al. v. Indiana Department of Natural Resources*, 7 Caddnar 1 (1993). The administrative law judge is the ultimate authority for a civil penalty assessment issued under the surface coal mining law. *Green Construction of Indiana v. Department of Natural Resources*, 7 Caddnar 8 (1993).

"The Indiana General Assembly has developed a statutory relationship between the Department and the Commission designed to support meaningful review of decisions at the agency level." In accordance with an alternative stated by the Legislative Services Agency in its Sunset Audit of the DNR and NRC in 1989, the DNR Director was given authority for day-to-day licensing decisions. Administrative review of those decisions was placed in the Commission. *Hoosier Environmental Council v. RDI/Caesar's River Boat Casino, et al*., 8 Caddnar 48 (1998).

312 IAC 3-1-2.5 "Code of judicial conduct" as applied to administrative law judges and division of hearings under IC 14-10-2-2

Authority: IC 14-10-2-4
Affected: IC 4-21.5; IC 14-10-2-2

Sec. 2.5. (a) The following definitions apply throughout this section:

(1) "Administrative law judge" means an administrative law judge for the natural resources commission.

(2) "Code of judicial conduct" refers to the code of judicial conduct adopted by the Indiana supreme court, effective March 1, 1993 (including amendments received through October 15, 2009).

(b) This section is intended to assist with the implementation of IC 14-10-2-2(a)(2)(C), which requires administrative law judges to comply with the applicable provisions of the code of judicial conduct.

(c) For purposes of this section, wherever in the code of judicial conduct the term:

(1) "court personnel" or a term of similar application is used, the term applies to an employee of the commission's division of hearings, other than an administrative law judge; and

(2) "judge" is used, the term applies to an administrative law judge.

(d) Unless otherwise specified in subsection (e), the provisions of the code of judicial conduct are applicable to an administrative law judge. These provisions shall be liberally construed to implement the intention of IC 14-10-2-2.

(e) The following provisions of the code of judicial conduct are inapplicable to an administrative law judge:

(1) Canon 2.17 and 2.8(C).

(2) Canon 3.2 and 3.4.

(3) Canon 3.9 if mediation services are provided in the ordinary course of commission employment or on a pro bono publico basis.

(4) Canon 3.10, to the extent that the practice of law in a representational capacity on a pro bono publico basis pursuant to the Indiana Rules of Professional Conduct, Rule 6.1 is prohibited. Such practice of law shall, however, be conducted subject to all applicable requirements of the code of judicial conduct.

(5) Canon 3.15(B) and 3.15(C).

(6) Canon 4.

(Natural Resources Commission; 312 IAC 3-1-2.5; filed Jan 26, 2007, 10:48 a.m.: 20070214-IR-312060107FRA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA; filed Jan 5, 2011, 3:14 p.m.: 20110202-IR-312100162FRA)

Annotation: In 2005, amendments were enacted to IC 14-10-2-2 to help clarify the responsibilities of the Commission's Division of Hearings. The standards for administrative law judges were made to more closely equate to those of environmental law judges in the Office of Environmental Adjudication. One of the statutory amendments required an administrative law judge to comply with the "applicable provisions of the code of judicial conduct." Similar language already applied to environmental law judges. To help assure that the legislative design would be implemented uniformly between the Office of Environmental Adjudication and the Division of Hearings, the two offices cooperated to develop parallel rule sections. In

2007, final adoption was given to 312 IAC 3-1-2.5, as well as to its counterpart for the Office of Environmental Adjudication at 315 IAC 1-1-2.

Amendments effective in 2011 caused this rule section to conform to Indiana Supreme Court modifications to the Code of Judicial Conduct made through 2009. An exception to application of the Code of Judicial Conduct was made for mediation services if provided in the ordinary course of Commission employment or if provided pro bono.

312 IAC 3-1-3 Initiation of a proceeding for administrative review

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 4-21.5-3-7; IC 4-21.5-3-8; IC 4-21.5-4; IC 14-34; IC 14-37-9; IC 25

Sec. 3. (a) A proceeding before the commission, under IC 4-21.5, as well as administrative review of a determination of the Indiana board of licensure for professional geologists or the Indiana board of registration for soil scientists, is initiated when one (1) of the following is filed with the Division of Hearings, Indiana Government Center-North, 100 North Senate Avenue, Room N501, Indianapolis, Indiana 46204:

(1) A petition for review under IC 4-21.5-3-7.
(2) A complaint under IC 4-21.5-3-8.
(3) A request for temporary relief under IC 14-34.
(4) A request to issue or for review of an issued emergency or other temporary order under IC 4-21.5-4.
(5) A request concerning an integration order under IC 14-37-9.
(6) An answer to an order to show cause under section 5 of this rule.
(7) A referral by the director of a petition for and challenge to litigation expenses under section 13(g) of this rule.

(b) As soon as practicable after the initiation of administrative review under subsection (a), the division director shall appoint an administrative law judge to conduct the proceeding.

(Natural Resources Commission; 312 IAC 3-1-3; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Oct 19, 1998, 10:12 a.m.: 22 IR 749; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1543; filed Aug 29, 2002, 1:03 p.m.: 26 IR 8; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; filed Mar 4, 2008, 12:31 p.m.: 20080402-IR-312070486FRA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)

Annotation: In 1996, the section reorganized 310 IAC 0.6-1-4 and added new language. References were made to determinations, which are subject to administrative review, not specifically recognized in the prior section. The section was amended 1998 to reference administrative review from the Indiana Board of Certification (now "Licensure") for Professional Geologists and in 2002 to reference administrative review from the Indiana Board of Registration for Soil Scientists. In 2008, the address for filing petitions was changed to reflect the relocation of the Commission's Division of Hearings to the Indiana Government Center North.

In addition to the DNR, a landowner may initiate a complaint, under 312 IAC 3-1-3(a)(2), against a timber buyer for the wrongful harvest of trees. *Fischer v. Stodghill and Hartford Fire Insurance Company*, 10 Caddnar 147, 159 (2005).

Civil pleadings are to be construed to do substantial justice, lead to disposition on the merits, and avoid litigation of procedural points. This construction is also appropriate to requests for administrative review. "The result would be both incongruous and inequitable if a more stringent standard for initiating a claim were required for the informal AOPA than for a more formal civil proceeding." *Hoosier Environmental Council v. Vigo Coal Company*, 8 Caddnar 13 (1997) and cited in *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, et al.*, 8 Caddnar 48 (1998).

A person who seeks administrative review of a determination by the Department regarding formulation or amendment of a "district plan" for a conservancy district must aver the Department failed to properly

review technical, engineering, or scientific issues. In the absence of these averments, the Commission lacks subject-matter jurisdiction to provide administrative review. *Wilson v. Cordry-Sweetwater Conservancy District and DNR*, 8 Caddnar 10 (1997).

The fundamental purpose of pleadings in an administrative proceeding is to inform each party of the other's position so that each can properly prepare. Where pleadings are overly broad or seek imposition of Commission authority where it lacks subject-matter jurisdiction, the remedy is the exorcism of offending averments. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino, et al*., 8 Caddnar 48 (1998).

312 IAC 3-1-4 Answers and affirmative defenses

Authority: IC 14-10-2-4
Affected: IC 4-21.5; IC 14; IC 25

Sec. 4. (a) Except as provided in subsection (b) and in sections 5 and 13 of this rule, the matters contained in a pleading described in section 3(a) of this rule are deemed automatically denied by any other party.

(b) A party wishing to assert an affirmative defense, counterclaim, or cross-claim shall do so, in writing, filed and served not later than the initial prehearing conference, unless otherwise ordered by the administrative law judge. *(Natural Resources Commission; 312 IAC 3-1-4; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-5(a).

Although AOPA does not identify what are affirmative defenses, the Trial Rules may be referenced as guidance for their identification. Trial Rule 8(c) lists estoppel and laches. Any "matter constituting avoidance" is also in the nature of an affirmative defense. Trial Rule 8(c). As a consequence, a prescriptive easement is another affirmative defense. A person seeking the benefits of an affirmative defense has the burden of proof and is responsible for raising the defense in a timely fashion. *Belcher & Belcher v. Yager-Rosales*, 11 Caddnar 79 (2007), affirmed on judicial review in *Yager-Rosales v. Belcher*, Kosciusko Circuit Court, 43C01-0704-MI-441 (2008).

312 IAC 3-1-5 Pleadings for and disposing of a show cause order issued under the Indiana Surface Mining Control and Reclamation Act

Authority: IC 14-10-2-4
Affected: IC 4-21.5-3; IC 14-34-15-7; IC 15

Sec. 5. (a) This section governs the suspension or revocation of a permit under IC 14-34-15-7.

(b) When the director determines that a permit issued pursuant to IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25 should be suspended or revoked, the director (or a delegate of the director) shall issue to the permittee an order of permit suspension or revocation pursuant to IC 14-34-15-7. An order of permit suspension or revocation shall allege the following:

(1) A pattern of violations of:
  (A) IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25; or
  (B) any permit condition required by IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25.
(2) The violations alleged in the order of permit suspension or revocation are either:
  (A) willfully caused by the permittee; or
  (B) caused by the permittee's unwarranted failure to comply with:
    (i) IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25; or
    (ii) any permit condition required by IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25.

For the purposes of this subsection, the unwarranted failure of the permittee to pay any fee required under IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25 constitutes a pattern of violations and requires the issuance of an order of permit suspension or revocation.

(c) An order of permit suspension or revocation issued under subsection (b) shall be served by certified mail or by personal delivery. An order of permit suspension or revocation is governed by IC 4-21.5-3-6.

(d) A permittee who desires to contest an order of permit suspension or revocation must, within thirty (30) days of permittee's receipt of the order of permit suspension or revocation, file a petition for review pursuant to IC 4-21.5-3-7. A petition for review under this subsection shall set forth the following:

(1) The reasons in detail why a pattern of violations of IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25, or any permit condition required by IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25 does not exist or has not existed, including all reasons for contesting:

(A) that the facts alleged in the order of permit suspension or revocation constitute a pattern of violations;

(B) the willfulness of the violations; or

(C) whether the violations were caused by the unwarranted failure of the permittee to comply with IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25, or any permit condition required by IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25.

(2) All mitigating factors the permittee believes exist in determining the terms of the revocation or the length and terms of the suspension.

(3) Any other alleged relevant facts.

(4) Whether a hearing on the order of permit suspension or revocation is desired.

(e) If a petition for review is not filed by the permittee under subsection (d), the order of permit suspension or revocation shall become an effective and final order of the commission without a proceeding pursuant to IC 14-34-15-7(c).

(f) If a petition for review is filed by the permittee under subsection (d) and a hearing on the order is sought by the permittee, the matter shall be assigned to an administrative law judge for a proceeding under IC 4-21.5-3. The proceeding is commenced when the permittee files a petition for review under subsection (d). In a hearing conducted under this section, the director has the burden of going forward with evidence demonstrating that the permit in question should be suspended or revoked. The director satisfies the burden under this subsection upon establishing a prima facie case that:

(1) a pattern of violations of:

(A) any requirements of IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25; or

(B) any permit conditions required under IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25;

exists or has existed; and

(2) the violations were:

(A) willfully caused by the permittee; or

(B) caused by the unwarranted failure of the permittee to comply with:

(i) any requirements of IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25; or

(ii) any permit conditions required under IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25. If the director demonstrates that the permit in question should be suspended or revoked, the permittee has the ultimate burden of persuasion to show cause why the permit should not be suspended or revoked. A permittee may not challenge the fact of any violation that is the subject of a final order of the director.

(g) Upon a determination by the administrative law judge that a pattern of violations exists or has existed, the administrative law judge shall issue a nonfinal order that does the following:

(1) Considers the factors set forth in 312 IAC 25-7-7.

(2) Need not find that all of the violations listed in the order of permit suspension or revocation occurred, but only that sufficient violations occurred to establish a pattern.

(3) Complies with the requirements of IC 4-21.5-3-27(a) through IC 4-21.5-3-27(d) and IC 4-21.5-3-27(g). The provisions of IC 4-21.5-3-27(e) and IC 4-21.5-3-27(f) shall not apply to permit suspension or revocation procedures.

(4) May, at any time prior to the conclusion of the hearing of record, allow the parties to submit briefs and proposed findings.

(h) The nonfinal order of the administrative law judge shall be submitted to the commission:

(1) Within ten (10) days following the date that the hearing of record is closed by the administrative law judge.

(2) Within ten (10) days of the receipt of the permittee's petition for review submitted under subsection (d) if no hearing is requested by any party and the administrative law judge determines that no hearing is necessary.

(i) To preserve for judicial review an objection to the nonfinal order of an administrative law judge, a party must object to the findings and nonfinal order in writing that:

(1) identifies the bases of the objection with reasonable particularity; and

(2) is filed with the commission within fifteen (15) days after the findings and nonfinal order are served on the party.

(j) After an administrative law judge issues a nonfinal order under subsection (g), the commission shall enter a final order affirming, modifying, or vacating the order of permit suspension or revocation. The final order of the commission shall be entered within forty-five (45) days following the issuance of the nonfinal order. The final order of the commission shall be issued within:

(1) sixty (60) days following the date that the hearing of record is closed by the administrative law judge; or

(2) sixty (60) days following the administrative law judge's receipt of the permittee's petition for review filed under subsection

(d) if no hearing was requested by any party and the administrative law judge determined that no hearing was necessary.

(k) If the permit is suspended, the minimum suspension period shall be three (3) working days unless the commission finds that imposition of the minimum suspension period would result in manifest injustice and would not further the purposes of:

(1) IC 13-4.1 before its repeal, IC 14-34, 312 IAC 25; or

(2) any permit condition required by IC 13-4.1 before its repeal, IC 14-34, or 312 IAC 25.

The commission may impose preconditions to be satisfied prior to the suspension being lifted.

(l) The commission shall serve the parties with a copy of the final order of the commission as provided in IC 4-21.5-3-28. Following notification under this subsection, a party may apply for judicial review under IC 4-21.5 of any matter determined under this section. *(Natural Resources Commission; 312 IAC 3-1-5; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1317; filed Feb 7, 2000, 3:31 p.m.: 23 IR 1363; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; errata filed May 7, 2008, 10:49 a.m.: 20080521-IR-312080333ACA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section applies exclusively to IC 14-34 (sometimes called the "Indiana Surface Mining Control and Reclamation Act" or "SMCRA") and replaces former 310 IAC 0.6-1-5(b) through (j). Substantive changes were also made when this section was adopted. Technical corrections were made in 2008 to reflect the renumbering of several cross-referenced rules.

312 IAC 3-1-6 Amendment of pleadings

Authority: IC 14-10-2-4
Affected: IC 14; IC 25

Sec. 6. (a) A pleading described in section 3(a) of this rule may be amended once as a matter of course before a response is filed, but not later than the initial prehearing conference or fifteen (15) days before a hearing (whichever occurs first), except by leave of the administrative law judge. Leave shall be granted where justice requires.

(b) If the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *(Natural Resources Commission; 312 IAC 3-1-6; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1319; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546)*

Annotation: This section reorganizes former 310 IAC 0.6-1-6.

The Commission provides in 312 IAC 3-1-6 for the amendment of petitions for administrative review filed under IC 4-21.5-3-7. A pleading may be amended once as a matter of course, within 15 days of filing, and subsequently upon leave by the administrative law judge where justice requires. Amendments in a pleading relate back to the original pleading. *Hoosier Environmental Council v. RDI/Caesar's Riverboat Casino*, 8 Caddnar 48 (1998).

If a person petitions for administrative review based upon limited information in an order by the Department, and the person files a supplemental petition after the Department provides a more detailed order, the supplemental petition relates back to the filing of the original petition. *Hoosier Environmental Council v. DNR and Vigo Coal Company*, 8 Caddnar 13 (1997).

312 IAC 3-1-7 Filing and service of pleadings and documents

Authority: IC 14-10-2-4
Affected: IC 4-21.5-3-1; IC 4-21.5-3-29; IC 4-21.5-5; IC 14; IC 23-1-20-15; IC 25

Sec. 7. (a) Pleadings and documents must be filed with the administrative law judge and served on all other parties.

(b) The filing of a pleading or document with the administrative law judge may be performed by any of the following:

(1) Personal delivery.

(2) United States mail under any of the following categories:

(A) First class.

(B) Certified.

(C) Express.

(D) Priority.

(3) Private carrier.

(4) Interoffice mail.

(5) Facsimile mail.

(6) Electronic mail.

(c) If an attorney or another authorized representative represents a party, service of a pleading or document must be made upon the attorney or other authorized representative. If an individual appears without separate representation, service must be made upon the individual.

(d) Filing or service is complete on the earliest of the following dates:

(1) The date on which the pleading or document is delivered.

(2) The date of the postmark on the envelope containing the pleading or document if the pleading or document is sent by a category of United States mail described in subsection (b)(2) and is properly addressed.

(3) The date on which the pleading or document is deposited with a private carrier, as shown by a receipt issued by the carrier, if the pleading or document is sent by a private carrier and is properly addressed.

(4) The date of receipt of the pleading or document, if the date of deposit or postmark cannot be determined.

(e) This section does not modify the time in which a party may file objections under IC 4-21.5-3-29 or a petition for judicial review under IC 4-21.5-5.

(f) IC 4-21.5-3-1(d) and IC 4-21.5-3-1(e) govern service by publication.

(g) As used in this section, "private carrier" means a person, other than the United States Postal Service, that delivers mail as defined in IC 23-1-20-15. *(Natural Resources Commission; 312 IAC 3-1-7; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1319; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; filed May 4, 2005, 1:15 p.m.: 28 IR 2660; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-7. New language addresses filing by interoffice mail, fax, and electronic mail.

In 2005, the section was amended to expand application of what is sometimes referred to as the "mailbox rule". Filing and service are complete when delivered to the U.S. post office or to a private carrier if performed by any of the four categories of U.S. mail listed under subsection (b)(2) or by private carrier under subsection (b)(3). Formerly, for service other than by first class mail, filing was complete only upon actual delivery to the Natural Resources Commission.

A timely filed fax may form the basis for obtaining administrative review. *Hoosier Environmental Council v. DNR and Vigo Coal Company*, 8 Caddnar 13 (1997).

312 IAC 3-1-8 Administrative law judge; automatic change

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 4-21.5-4; IC 14-34; IC 25

Sec. 8. (a) In addition to the reasons stated for the disqualification of an administrative law judge under IC 4-21.5, an automatic change of administrative law judge may be obtained under this section.

(b) A party, within ten (10) days after the appointment of an administrative law judge, may file a written motion for change of the administrative law judge without specifically stating the ground for the request.

(c) The administrative law judge shall grant a motion filed under subsection (b) and promptly notify the division director. The division director shall inform the parties of the names of two (2) other individuals from whom a substitute administrative law judge may be selected. A party who is opposed to the party who filed the motion under subsection (b) may, within five (5) days, select one (1) of the individuals named by the division director to serve as the substitute administrative law judge. In the absence of a timely designation by an opposing party under this subsection, the selection shall be made by the division director.

(d) This section does not apply:

(1) where a previous change of administrative law judge has been requested under this section;

(2) to a proceeding under IC 4-21.5-4;

(3) to temporary relief under:

(A) IC 13-4.1 before its repeal; or

(B) IC 14-34;

(4) if an administrative law judge has issued a stay or entered an order for disposition of all or a portion of the proceeding;

(5) if the commission orders a suspension of the section where its continued application is impracticable as a result of inadequate staffing;

(6) to a proceeding to review a determination by the:

(A) Indiana board of licensure for professional geologists; or

(B) Indiana board of registration for soil scientists; or

(7) to a member of a panel described in IC 14-10-2-2.5(c).

(Natural Resources Commission; 312 IAC 3-1-8; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1319; filed Feb 7, 2000, 3:31 p.m.: 23 IR 1365; filed Aug 29, 2002, 1:03 p.m.: 26 IR 8; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA; filed Apr 3, 2009, 2:00 p.m.: 20090429-IR-312080688FRA)

Annotation: This section reorganizes former 310 IAC 0.6-1-8. Amendments made in 2000 authorized the Commission to suspend application of the section where impracticable as a result of inadequate staffing. Amendments made in 2002 provided the section does not apply to administrative reviews of determinations from the Geologist Licensure Board or the Soil Scientists Registration Board. Amendments made in 2009 provided the section does not apply to the panel for a consolidated proceeding with the Office of Environmental Adjudication under IC 14-20-2-2.5 and 312 IAC 3-1-10.5.

312 IAC 3-1-9 Defaults, dismissals, and agreed orders

Authority: IC 14-10-2-4
Affected: IC 4-21.5-3; IC 4-21.5-5; IC 14; IC 25

Sec. 9. (a) An administrative law judge may enter a final order of dismissal if the party who initiated administrative review requests the proceeding be dismissed.

(b) An administrative law judge may, on the motion of the administrative law judge or the motion of a party, enter a proposed order of default or proposed order of dismissal under IC 4-21.5-3-24, if at least one (1) of the following applies:

(1) A party fails to attend or participate in a prehearing conference, hearing, or other stage of the proceeding.

(2) The party responsible for taking action does not take action on a matter for a period of at least sixty (60) days.

(3) The person seeking administrative review does not qualify for review under IC 4-21.5-3-7.

(4) A default or dismissal could be entered in a civil action.

(c) Within seven (7) days after service of a proposed order of default or dismissal, or within a longer period prescribed by the proposed order, a party may file a written motion requesting the order not be imposed and stating the grounds relied upon. During the time within which a party may file a written motion under this subsection, the administrative law judge may adjourn the proceedings or conduct them without participation of the party against whom a proposed default order was issued, having due regard for the interest of justice and the orderly and prompt conduct of the proceeding.

(d) If the party fails to file a written motion under subsection (c), the administrative law judge shall issue an order of default or dismissal. If the party has filed a written motion under subsection (c), the administrative law judge may either enter or refuse to enter an order of default or dismissal.

(e) After issuing an order of default, but before issuing a final order or disposition, the administrative law judge shall conduct any action necessary to complete the proceeding without the participation of the party in default and shall determine all issues in the adjudication, including those affecting the defaulting party. The administrative law judge may conduct proceedings under IC 4-21.5-3-23 to resolve any issue of fact.

(f) An administrative law judge shall approve an agreed order entered by the parties if it is:

(1) clear and concise; and

(2) lawful.

(g) The secretary of the commission, as its designee under IC 4-21.5-3-28(b), may affirm the entry of an agreed order approved by the administrative law judge under subsection (f).

(h) A final order entered under this section is made with prejudice unless otherwise specified in the order. A person may seek judicial review of the order as provided in IC 4-21.5-5. *(Natural Resources Commission; 312 IAC 3-1-9; filed Feb 5, 1996, 4:00 p.m.:19 IR 1320; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-9. New language includes authorization for an administrative law judge to make a final determination for dismissals and defaults.

An administrative law judge may enter a final dismissal under this section, if neither party makes a timely objection to a proposal to dismiss the proceeding as moot. *Waikel v. DNR*, 12 Caddnar 270 (2010).

Dismissal with prejudice is appropriate where a claimant refuses to respond to discovery, insists upon a secret hearing, and fails to show he is aggrieved by the subject order. *Save Our Rivers, et al. v. Guenther, Ford, and DNR, In re Broz*, 10 Caddnar 142 (2005).

The Commission has delegated authority to its administrative law judges to grant a final order of dismissal. The Department and the Commission, on administrative review, have only the powers specifically granted by the Indiana General Assembly. In the absence of state enabling legislation, state agencies cannot implement federal law. Where the Department and Commission are not granted

authority over the Federal Water Pollution Control Act, an administrative law judge must dismiss a claim founded upon that act. *Pratt v. Indianapolis Water Co. & DNR*, 8 Caddnar 17 (2001).

312 IAC 3-1-10 Applicability of rules of trial procedure and rules of evidence

Authority: IC 14-10-2-4
Affected: IC 4-21.5; IC 14; IC 25

Sec. 10. Unless inconsistent with IC 4-21.5 or this rule, the administrative law judge may apply the Indiana Rules of Trial Procedure or the Indiana Rules of Evidence. *(Natural Resources Commission; 312 IAC 3-1-10; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1320; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-10. New language authorizes an administrative law judge to reference the Indiana Rules of Evidence unless otherwise prohibited.

If not otherwise inconsistent with IC 4-21.5, the Indiana Rules of Trial Procedure may be applied to a proceeding before the Commission. *Department of Natural Resources v. Fulton County*, et al., 6 Caddnar 123 (1993).

If not otherwise inconsistent with the administrative orders and procedures act or the Commission's procedural rules, the Indiana Rules of Trial Procedure may be applied to a proceeding pending before the Commission. Trial Rule 8(c), which recognizes estoppel as an affirmative defense, may be applied to a Commission proceeding. *Jaeco, Inc. v. Dept. (Div. Of Recl.)*, 5 Caddnar 100 (1990).

An expert may give opinion testimony based on hearsay, if it is type reasonably relied upon by experts in the field. Rules of Evidence 703. *Pierson v. DNR and American Aggregates d/b/a Martin Marietta*, 9 Caddnar 19 (2001).

Unless otherwise inconsistent with IC 4-21.5 or 312 IAC 3-1, this section provides an administrative law judge may apply the Indiana Rules of Trial Procedure. Neither IC 4-21.5 nor 312 IAC 3-1 consider directly a failure to state a claim upon which relief can be granted, but the concept is recognized in Trial Rule 12(B)(6). If subject-matter jurisdiction exists, but the pleadings are insufficient to demonstrate an actionable claim, an opportunity must be provided to file an amended pleading to correct the deficiency. Pursuant to Trial Rule 15(A), the pleading may be amended “once as a matter of right” within ten days after the administrative law judge serves notice. *Egenlauf v. Marshall County Comm’nrs*, 12 Caddnar 262, 263 (2010) citing *Indiana Office of Environmental Adjudication v. Kunz*, 714 N.E.2d 1190 (Ind. App. 1999) and *Ogden Dunes v. Army Corps & DNR*, 12 Caddnar 137, 141 (2009).

In considering the claim of a landowner against a timber buyer, a real estate broker’s assistant was competent to authenticate a written appraisal by the broker who was not present at hearing. Rule of Evidence 901. Even so, the appraisal was found to be “hearsay”, and the broker did not qualify for an exception to the general principle that hearsay testimony is inadmissible. Rule of Evidence 804. Since a timely objection was made to introduction of the appraisal, IC 4-21.5-3-26 applied. The resulting order of the Administrative Law Judge could “not be based solely upon the hearsay evidence.” *Schneider v. Grosnickle and Cincinnati Ins. Co.,* 9 Caddnar 180 (2004).

Trial Rule 26 through Trial Rule 37 governs depositions and discovery. When an adjudicatory hearing, including a hearing in a proceeding subject to judicial review, "is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure." Trial Rule 28(F). Under proper circumstances, Trial Rule 36(B) allows an administrative law judge to authorize the withdrawal of admissions, but leave to do so should not be routinely granted. Only in "rare cases" should withdrawal be authorized, as where there

are "changed circumstances" or there was "an improvident admission." The administrative law judge may permit withdrawal or amendment when presentation of merits of the action will be subserved, and the party who obtained the admission fails to satisfy the administrative law judge that the withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. *Miller, Trustee v. Miller, et al.,* 10 Caddnar 68 (2005), affirmed on judicial review in the Marion Superior Court, Room 11 (Cause No. 49D11-0505-CT-18941).

This section provides that to the extent the Trial Rules are not inconsistent with AOPA, the Trial Rules may be applied. Since a motion to dismiss referenced evidence outside the pleadings, Trial Rule 12(C) required the motion to be treated as one for summary judgment. A motion for summary judgment under AOPA is governed by IC 4-21.5-3-23. Reference may also be made to Trial Rule 56 to the extent it does not conflict with IC 4-21.5-3-23. *Travelstead v. Vigo Coal Co., and DNR*, 10 Caddnar 302 (2006).

312 IAC 3-1-10.5 Consolidated proceedings with office of environmental adjudication

Authority: IC 4-21.5-3-31; IC 14-10-2-2.5; IC 14-10-2-4
Affected: IC 4-21.5-3; IC 14; IC 25

Sec. 10.5. (a) This section controls the conduct of a proceeding presided over by an administrative law judge that is consolidated under IC 14-10-2-2.5 with a proceeding presided over by an environmental law judge of the office of environmental adjudication.

(b) Before acting on a motion for consolidation under IC 14-10-2-2.5(b), an administrative law judge or environmental law judge may do any of the following:

(1) Consult with any administrative law judge or environmental law judge that presides over a proceeding sought to be consolidated.

(2) Request documents, briefs, or oral arguments from the parties to the following:

(A) The proceeding pending before the administrative law judge or environmental law judge.

(B) The proceeding sought to be consolidated.

(c) If an administrative law judge or an environmental law judge enters an order for consolidation under IC 14-10-2-2.5(b), the order shall establish a panel that complies with IC 14-10-2-2.5(c).

(d) Unless otherwise agreed by the panel, the administrative law judge or environmental law judge that entered the order under subsection (c) shall perform the following functions:

(1) Open and maintain a new adjudicatory file that includes in its caption the phrase “In the Matter of Consolidated Proceeding under IC 14-10-2-2.5”.

(2) Include true and authentic copies of all pleadings and documents previously filed and orders previously entered in the proceedings that have been consolidated.

(3) Rule upon routine motions and requests by the parties, including objections at hearing. This subdivision does not prohibit the administrative law judge or environmental law judge from consulting with another panel member or members before ruling.

(e) The panel may make any orders concerning a consolidated proceeding that are necessary and proper.

(f) The panel, in furtherance of convenience and to avoid prejudice, or when separate hearings may be conducive to expedition and economy, may order a separate hearing of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or any number of claims, cross-claims, counterclaims, third-party claims, or issues.

(g) In furtherance of convenience and to avoid prejudice, the panel may certify a disposition of fewer than all issues as being ripe for judicial review where:

(1) a dismissal is granted with prejudice;

(2) a summary judgment is granted under IC 4-21.5-3-23; or

(3) a separate hearing is conducted under subsection (f).

(h) On a party’s motion or on the panel’s motion, the panel may terminate a consolidated proceeding in furtherance of convenience and to avoid prejudice. If a party moves to terminate a consolidated proceeding because all issues of the department of natural resources or of the department of environmental management have been

settled or adjudicated, the panel shall terminate the consolidated proceeding. An order for termination shall include any provisions that may reasonably support the convenience of the parties and the expeditious disposition by an administrative law judge or environmental law judge of the remaining proceeding.

(i) A final disposition of a consolidated proceeding shall be included both by the commission and by the office of environmental adjudication in their respective implementations of IC 4-21.5-3-32 and IC 4-21.5-3-27(c). *(Natural Resources Commission; 312 IAC 3-1-10.5; filed Apr 3, 2009, 2:00 p.m.: 20090429-IR-312080688FRA)*

Annotation: This section was adopted in 2009 in cooperation with the Office of Environmental Adjudication to assist with implementation of IC 14-10-2-2.5 as added by P.L. 84-2008, SEC. 8. OEA adopted a parallel section at 315 IAC 1-3-16.

312 IAC 3-1-11 Conduct of hearing; separation of witnesses

Authority: IC 14-10-2-4
Affected: IC 14; IC 25

Sec. 11. (a) An administrative law judge shall govern the conduct of a hearing and the order of proof.

(b) On a motion by a party before the commencement of testimony, the administrative law judge shall provide for a separation of witnesses. *(Natural Resources Commission; 312 IAC 3-1-11; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1320; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-11.

312 IAC 3-1-12 Relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, including disposition of objections to nonfinal orders of administrative law judge; commission objections committee

Authority: IC 14-10-2-4; IC 4-21.5-3-28
Affected: IC 4-21.5-1-6; IC 4-21.5-3; IC 14-10-1-1; IC 25

Sec. 12. (a) This section governs relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, including the disposition of objections under IC 4-21.5-3-29.

(b) A party who wishes to contest whether objections provide reasonable particularity shall move, in writing, for a more definite statement. The administrative law judge may rule upon a motion filed under this subsection, and any other motion filed subsequent to the entry of the nonfinal order by the administrative law judge, and enter an appropriate order (including removal of an item from the commission agenda).

(c) If objections are timely filed, the objections shall be scheduled for argument before the commission committee established by subsection (d), simultaneously with the presentation by the administrative law judge of findings, conclusions, and a nonfinal order. Unless otherwise ordered by the commission committee, argument shall not exceed ten (10) minutes for each party and twenty (20) minutes for each side.

(d) For the review of objections, and to consider any other appropriate relief under IC 4-21.5-3-28 through IC 4-21.5-3-31, the chair of the commission shall appoint a committee consisting of at least three (3) members of the commission. To the extent practicable, the chair shall include persons on the committee who are licensed to practice law in Indiana. The chair shall announce the members of the committee during the first meeting of the commission held in a calendar year. The chair may supplement or modify the membership of the committee, as needed for the efficient conduct of the proceedings, during the course of the year. A member of the committee may serve through a designate where a designate is authorized under IC 14-10-1-1. A final determination by the committee is a final agency action of the commission under IC 4-21.5-1-6.

(e) At least ten (10) days before oral argument is scheduled on objections filed under subsection (c), a nonparty may file a brief with the commission committee. A copy of the brief must be served upon each party. The brief must not be more than five (5) pages long and cannot include evidentiary matters outside the record. Unless otherwise ordered by the commission committee, a nonparty may also present oral argument for not more than five

(5) minutes in support of the brief. If more than one (1) nonparty files a brief, the administrative law judge shall order the consolidation of briefs if reasonably necessary to avoid injustice to a party. A nonparty who has not filed a brief at least ten (10) days before oral argument is first scheduled on objections may participate in the argument upon the stipulation of the parties.

(f) Upon the written request of a party filed at least forty-eight (48) hours before an oral argument to consider objections, the commission committee shall provide the services of a stenographer or court reporter to record the argument.

(g) If objections are not filed, the secretary of the commission may affirm the findings and nonfinal order. The secretary has exclusive jurisdiction to affirm, remand, or submit to the commission for final action, any findings and nonfinal order subject to this subsection. No oral argument will be conducted under this subsection unless ordered by the secretary.

(h) A party may move to strike all or any part of objections, a brief by a nonparty, or another pleading under this section that the party believes does not comply with this section. The administrative law judge shall act upon a motion filed under this subsection by providing relief that is consistent with IC 4-21.5 and this rule. *(Natural Resources Commission; 312 IAC 3-1-12; filed Feb 5, 1996; 4:00 p.m.: 19 IR 1320; filed Oct 19, 1998, 10:12 a.m.: 22 IR 749; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; filed May 27, 2003, 12:30 p.m.: 26 IR 3323; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: In 1996, the section reorganized provisions contained in 310 IAC 0.6-1-12. New language delegated authority from the Commission to its Secretary to act upon a nonfinal order of an administrative law judge where no objections to the nonfinal order were timely filed by a party.

Several amendments were made to the section in 1998. In subsection (c), the term "conclusions" was added in recognition that P.L. 25-1977 amended IC 4-21.5-3-27(c) to require conclusions of law for most decisions by the Natural Resources Commission and its Administrative Law Judges. A new subsection (d) established standards for nonparty (or amicus curiae) participation in an "objections" argument before the Commission. Subsection (e) was amended to clarify that the Commission, and not the DNR, provides the court reporter. Subsection (f) was amended to extend from merely lack of timeliness, to any legally supportable cause, the basis upon which a party might move to strike pleadings and documents filed with respect to an "objections" argument. The administrative law judge was delegated authority to rule upon a motion to strike.

In 2003, the section was fundamentally restructured to establish a Commission Committee to take final agency action for any matter governed by IC 4-21.5-3-28 through IC 4-21.5-3-31, including the filing of "objections" to a nonfinal order by an administrative law judge. Commonly known as the "AOPA Committee", its activities are further illuminated in a nonrule policy document (NRC Information Bulletin #42) that was first published in the Indiana Register at 27 IR 2116 (March 1, 2004). The first meeting of the AOPA Committee was held on April 14, 2004. The Commission reaffirmed the nonrule policy document in 2006, as published in the Indiana Register at 20061213-IR-312060568NRA (December 13, 2006), and as accessible on the Commission's website through www.ai.org/nrc/2375.htm.

Krivak v. DNR, Dempsey, Lenzen, and Amelio, 7 Caddnar 176 (1994). A "response", filed following the entry of findings and a nonfinal order by the administrative law judge, contained sufficient particularity to qualify as "objections" under 310 IAC 0.6-1-12 (now this section).

312 IAC 3-1-13 Awards of litigation expenses for specified proceedings

Authority: IC 14-10-2-4
Affected: IC 4-21.5; IC 14-22-26-5; IC 14-24-11-5; IC 14-34-15-10; IC 14-37-13-7

Sec. 13. (a) This section governs an award of costs and expenses reasonably incurred, including attorney fees, under IC 14-22-26-5, IC 14-24-11-5, IC 14-34-15-10, or IC 14-37-13-7.

(b) Except as otherwise provided in this subsection, no award for costs and expenses, including attorney fees, shall be entered under IC 14-22-26-5, IC 14-24-11-5, or IC 14-37-13-7 unless there is a finding that the person

against whom the award is made acted for the purpose of harassing or embarrassing an opposing party. The department may obtain an award for reasonable expenses incurred to seize and hold an animal, without a showing of harassment or embarrassment, if the department prevails under IC 14-22-26.

(c) Costs and expenses may be awarded from the department to any person, other than a permittee or the permittee's authorized representative, who initiates or participates in a proceeding under IC 14-37-13-7, and who prevails in whole or part, achieving at least some degree of success on the merits, upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

(d) Appropriate costs and expenses, including attorney fees, may be awarded under IC 14-34-15-10 only as follows:

(1) To any person from the permittee if the person initiates or participates in an administrative proceeding reviewing enforcement and a finding is made by the administrative law judge or commission that:

(A) a violation of IC 14-34, a rule adopted under IC 14-34, or a permit issued under IC 14-34 has occurred or that an imminent hazard existed; and

(B) the person made a substantial contribution to the full and fair determination of the issues.

However, a contribution of a person who did not initiate a proceeding must be separate and distinct from the contribution made by a person initiating the proceeding.

(2) To a person from the department, other than to a permittee or the permittee's authorized representative, who initiates or participates in a proceeding and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that the person made a substantial contribution to a full and fair determination of the issues.

(3) To a permittee from the department if the permittee demonstrates that the department issued a cessation order, a notice of violation, or an order to show cause why a permit should not be suspended or revoked in bad faith and for the purpose of harassing or embarrassing the permittee.

(4) To a permittee from a person where the permittee demonstrates that the person initiated a proceeding under IC 14-34-15 or participated in the proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

(5) To the department where it demonstrates that a person sought administrative review or participated in a proceeding in bad faith and for the purpose of harassing or embarrassing the department.

(e) The commission may order a person requesting a hearing to pay the cost of the court reporter if the person requesting the hearing fails, after proper notice, to appear at the hearing.

(f) In determining what is a reasonable amount of attorney fees under subsection (b), consideration shall be given to the following factors:

(1) The nature and difficulty of the proceeding.

(2) The time, skill, and effort involved.

(3) The fee customarily charged for similar legal services.

(4) The amount involved in the proceeding.

(5) The time limitations imposed by the circumstances.

(6) For a party represented by an attorney who is a full-time, salaried employee of the party, consideration also shall be given to the prorated cost of:

(A) the salary of the attorney and clerical or paralegal employees of the party who assisted the attorney; and

(B) their employee benefits attributable to the time devoted to representation.

(g) A party who wishes to seek litigation expenses must petition the director within thirty (30) days after the party receives notice of the final agency action. A party wishing to challenge the petition for an award must deliver a written response to the director within fifteen (15) days of service of the petition. If a petition and challenge are delivered to the director under this subsection, the director shall refer the matter to the division of hearings of the commission for the conduct of a proceeding under IC 4-21.5. *(Natural Resources Commission; 312 IAC 3-1-13; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1321; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-13.

The section considers the reimbursement of litigation expenses and attorney fees within specified regulatory programs involving surface coal mining and reclamation, oil and gas operations and site reclamation, activities associated with entomology and plant pathology, and the possession or seizure of live wild animals. Substantive changes were made from prior language with respect to the surface coal mining and reclamation program.

For enforcement actions under the Indiana Surface Mining Control and Reclamation Act, litigation expenses are available to citizen petitioners but are not available to the DNR. Pursuant to 310 IAC 0.6-1-13 (now this section), a citizen cannot obtain the reimbursement of litigation expenses incurred in association with a permitting action. *Town of Hymera, et al. v. Shand Mining, et al*., 7 Caddnar 80 (1996).

In addition, a citizen must show that the citizen achieved at least some degree of success on the merits and made a substantial contribution to the determination of the issues. A case dismissed for mootness does not typically carry with it a demonstration of success on the merits, although a case "might be imagined where mootness followed a partial but significant disposition of issues." Id.

Hoosier Environmental Council v. Foertsch Constr. Co. and DNR, 8 Caddnar 178 (2003) considered an award of litigation expenses sought by a citizen group against the DNR in an action subject to the Surface Mining Control and Reclamation Act ("SMCRA"). A special administrative law judge granted an award, but following oral argument on objections, the Natural Resources Commission reversed. The Marion Superior Court (Cause No. 49D03-0310-PL-1806) reversed the NRC's final order and remanded to the Commission with instructions to enter an award of litigation expenses that tracked closely with the earlier decision of the ALJ.

The Court of Appeals of Indiana affirmed in part and reversed in part in *Indiana Department of Natural Resources v. Hoosier Environmental Council, Inc.*, 831 N.E.2d 804 (Ind. App. 2005). The court determined an examination of litigation expenses under SMCRA and this rule section involves a two-prong approach. First, there is an eligibility requirement, in which a party must demonstrate that it achieved at least some degree of success on the merits. Second, if eligibility is satisfied, the focus shifts to an entitlement requirement, where the party must demonstrate it made a substantial contribution to the determination of issues. The court concluded HEC had satisfied the eligibility requirement, and the proceeding should be remanded to the NRC to consider the amount of entitlement.

On remand, a substitute administrative law judge found a determination of eligibility did not direct the amount of compensation. Only an excellent result supported full reimbursement for litigation expenses. On the other hand, the Department's argument was rejected that success on a procedural argument was non-compensable. The proper measure is based upon the significance of issues on which the party prevailed, and not an allocation based upon fraction measured by an enumeration of issues. The common method for determining the reasonableness of a fee is with an examination of the lodestar—the number of hours reasonably expended multiplied by a reasonable hourly rate for those significant issues on which there was success. The Hoosier Environmental Council was awarded $90,179.39 in costs and expenses, including attorney fees. Following extended discussions and with the incorporation of clarifications to several legal questions, the Commission affirmed the nonfinal order of the administrative law judge. *Hoosier Environmental Council v. DNR*, 10 Caddnar 324 (2006).

Twice more the Marion Superior Court provided judicial reviews. The final remand to the Commission occurred in December 2008 with the inclusion of additional attorney fees and litigation expenses. The parties ultimately settled, and a Final Order of Dismissal was approved by the administrative law judge in September 2009. These events are chronicled in *Hoosier Environmental Council v. DNR*, 11 Caddnar 295 (2008).

312 IAC 3-1-14 Court reporter; transcripts

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 14; IC 25-17.6; IC 25-31.5

Sec. 14. (a) The commission (or, for administrative review of orders under IC 25-17.6, the Indiana board of licensure for professional geologists or under IC 25-31.5, the Indiana board of registration for soil scientists) shall employ and engage the services of a stenographer or court reporter, either on a full-time or a part-time basis, to record evidence taken during a hearing.

(b) A party may obtain a transcript of the evidence upon a written request to the administrative law judge.

(c) The party who requests a transcript under subsection (b) shall pay the cost of the transcript:

(1) as billed by the court reporting service; or

(2) if the transcript is prepared by an employee of the commission, as determined from time to time by the commission on a per page basis after consideration of all expenses incurred in the preparation of the transcript.

(d) For a proceeding in which the commission or its administrative law judge is the ultimate authority, a court reporter who is not an employee of the commission will be engaged to record a hearing upon a written request by a party filed at least forty-eight (48) hours before a hearing. *(Natural Resources Commission; 312 IAC 3-1-14; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1322; filed Oct 19, 1998, 10:12 a.m.: 22 IR 750; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1543; filed Aug 29, 2002, 1:03 p.m.: 26 IR 9; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: In 1996, the section reorganized former 310 IAC 0.6-1-14. In 1998, the section was amended to reflect the Indiana Board of Certification (now "Licensure") for Professional Geologists would supply a stenographer or court reporter for the administrative review of its licensing and disciplinary orders. A parallel provision was added for the Indiana Board of Registration for Soil Scientists in 2002.

In 1988, the Commission set the rates for a court reporter that is an employee of the Division of Hearings. During its March 24, 1998 meeting, the commission increased transcription fees to $3.80 a page for requests made after April 1, 1998, but with no additional fee assessed for the employee court reporter to appear and no hourly fee. The Commission retained this fee schedule in 2002 and again in 2006. "Establishment of Division of Hearings, Indexing of Final Adjudicative Agency Decisions, Transcript Fees," Information Bulletin #1 (Second Amendment), INDIANA REGISTER, 20061011-IR-312060438NRA (Oct. 11, 2006).

312 IAC 3-1-15 Quasi-declaratory judgments

Authority: IC 14-10-2-4
Affected: IC 4-21.5-3-5; IC 14-21-1; IC 25

Sec. 15. (a) A person may, in writing, request the department to interpret a statute or rule administered by the department as applicable to a specific factual circumstance. The request must:

(1) describe with reasonable particularity all relevant facts;

(2) cite with specificity the statutory or rule sections in issue;

(3) identify any other person who may be affected by a determination of the request; and

(4) describe the relief sought.

(b) The director, the director's delegate, or the state historic preservation review board (for an action controlled by IC 14-21-1) may, within forty-five (45) days, provide a written response to the request. The response may set forth an interpretation based upon the information provided in the request or may specify additional information needed to respond to the request. If additional information is specified, an additional forty-five (45) days is provided to the department in which to respond.

(c) If the department does not respond within the periods described in subsection (b), a general denial of the request is deemed to have resulted.

(d) If the person seeking the request under subsection (a) is aggrieved by the response of the department under subsection (b) or a general denial under subsection (c), that person may file a petition for administrative review under IC 4-21.5-3. The response constitutes a determination of status under IC 4-21.5-3-5(a)(5).

(e) This section does not excuse a person from a requirement to exhaust another administrative remedy provided by statute or rule. A person may not under this section void or modify a final order entered by the department in another proceeding. A request under this section does not toll or extend any time limitation imposed on the availability of another administrative remedy. A final order of the department under this section, which follows a contested proceeding under IC 4-21.5-3, provides the same precedent as a final order following any other contested proceeding under IC 4-21.5-3. *(Natural Resources Commission; 312 IAC 3-1-15; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1322; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-15 that provided for "special status determinations".

310 IAC 0.6-1-15 (now this section) provides an opportunity to seek relief from application of the Indiana Surface Mining Control and Reclamation Act. The section establishes a "quasi-declaratory judgment" process within the commission from which an aggrieved person may take judicial review. *Scales v. State*, (1990 Ind. App.), 563 N.E.2d 664, 666.

310 IAC 0.6-1-15 (now this section) provides for quasi-declaratory relief and may properly be applied to determining responsibility for an alleged ground water emergency. *John Brown Status for Water Well Replacement Required by a Ground Water Emergency*, 6 Caddnar 46 (1992).

A person cannot use 310 IAC 0.6-1-15 (now this section) to avoid the exhaustion of another administrative remedy provided by rule or by statute. A coal company could not, therefore, properly invoke the section as a substitute for seeking a revision to its permit terms governing blasting. *Solar Sources, Inc. v. The Indiana Department of Natural Resources*, 7 Caddnar 83 (1995).

This section does not determine the "ultimate authority" for a particular case. The substantive law governs the determination. Since the Indiana Surface Mining Control and Reclamation Act makes an administrative law judge the "ultimate authority" for all but permit and permit revocation cases, the administrative law judge is the ultimate authority for a quasi-declaratory judgment sought under SMCRA. Id.

310 IAC 0.6-1-15 (now this section) allows a person to request in writing that the Department interpret a statute or rule which the Department administers. The interpretation is subject to administrative review. *DeMunck Status of "Weed Machine" under the Public Freshwater Lake Law*, 6 Caddnar 115 (1993).

The Commission adopted 312 IAC 3-1-15 to provide a mechanism by which a person may, in writing, request the Department to interpret a statute or rule that it administers. *Department of Natural Resources v. Molden*, 11 Caddnar 1 (2007), *Oil & Industrial Service Co., Inc. v. DNR*, 9 Caddnar 57 (2002) and *Laverty and Citizens Coalition v. Town of Beverly Shores*, 9 Caddnar 24 (2001).

312 IAC 3-1-16 Continuances

Authority: IC 14-10-2-4
Affected: IC 14; IC 25

Sec. 16. (a) Upon the motion of a party, a hearing may be continued by the administrative law judge and shall be continued upon a showing of good cause.

(b) A motion to continue a hearing because of the absence of evidence must be made upon affidavit and must show:

(1) the materiality of the evidence expected to be obtained;
(2) that due diligence has been used to obtain the evidence;
(3) where the evidence may be; and
(4) if based on the absence of a witness:
(A) the name and residence of the witness, if known;
(B) the probability of procuring the testimony in a reasonable time;
(C) that absence of the witness was not procured by the party nor by others at the request, knowledge, or consent of the party;
(D) what facts the party believes to be true; and
(E) that the party is unable to prove the facts by another witness whose testimony can be readily procured.

(c) If, upon the receipt of a continuance motion under subsection (b), the adverse party stipulates to the truth of the facts which the party seeking the continuance indicated could not be presented, the hearing shall not be continued. *(Natural Resources Commission; 312 IAC 3-1-16; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1322; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-16.

312 IAC 3-1-17 Record of proceedings; adjudicative hearings generally; record of the director for surface coal mining permits

Authority: IC 14-10-2-4
Affected: IC 4-21.5-3-14; IC 4-21.5-3-33; IC 14-34-4-6; IC 14-34-4-13; IC 25

Sec. 17. (a) The record required to be kept by an administrative law judge under IC 4-21.5-3-14 commences when a proceeding is initiated under section 3(a) of this rule and includes the items described in IC 4-21.5-3-33.

(b) In addition to subsection (a), this subsection applies to a proceeding concerning the approval or disapproval of a permit application, permit revision application, or permit renewal under IC 14-34-4-13. However, nothing in this subsection precludes the admission of testimony or exhibits that are limited to the explanation or analysis of materials included in the record before the director, or the manner in which the materials were applied, used, or relied upon in evaluating the application. Upon a timely objection made before or during a hearing, the administrative law judge shall exclude testimony or exhibits that are offered but that identify or otherwise address matters that are not part of the record before the director under IC 14-34-4-13. The record before the director includes each of the following:

(1) The permit.
(2) The permit application as defined at 312 IAC 25-1-11.
(3) Documentation tendered or referenced, in writing, by the applicant or an interested person for the purposes of evaluating, or used by the department to evaluate, the application.
(4) The analyses of the department in considering the application, including the expertise of the department's employees and references used to evaluate the application.
(5) Documentation received under IC 14-34-4, including the conduct and results of any informal conference or public hearing under IC 14-34-4-6.
(6) Correspondence received or generated by the department relative to the application, including letters of notification, proofs of filing newspaper advertisements, and timely written comments from an interested person. *(Natural Resources Commission; 312 IAC 3-1-17; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1323; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; errata filed May 7, 2008, 10:49 a.m.: 20080521-IR-312080333ACA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: This section reorganizes former 310 IAC 0.6-1-17. In 2008, a technical correction was made to subsection (b)(2) to correct a cross-reference to a renumbered rule section.

The “record before the director” is an evidence-limiting concept established by the Indiana General Assembly at IC 13-4.1-4-5(c) (now IC 14-34-4-13(b)(3)) directed to the administrative review of permits issued for the Indiana Surface Coal Mining and Reclamation Act. This statutory concept is interpreted through 310 IAC 0.6-1-17(c) (now 312 IAC 3-1-(b)) to assure it will not preclude the admission of testimony or exhibits which are limited to explanation or analysis of materials included in the record before the Director. The "record before the director" specifically includes the permit and permit application, documents provided or referenced by interested parties, the evaluation of an application by the Department of Natural Resources, results of informal conferences, and timely written comments. The Hoosier Environmental Council voiced to the Department, during its permit review process, concerns about impacts the disposal of coal combustion waste might have on ground water. Technical papers offered through the Council's expert at public hearing, as being the basis for his professional opinions about coal combustion waste and on-site disposal, were within the "record before the director." The administrative law judge noted the technical papers dealt with chemical composition, leachability, and mobility. These topics had been thoroughly discussed in the permit and in the permit application, as well as analyzed by the Department. *Hoosier Environmental Council v. DNR and Solar Sources, Inc*., 7 Caddnar 85 (1995).

312 IAC 3-1-18 Petitions for judicial review

Authority: IC 14-10-2-4; IC 25-31.5-3-8
Affected: IC 4-21.5-5-8; IC 14; IC 25

Sec. 18. (a) A person who wishes to take judicial review of a final agency action entered under this rule shall serve copies of a petition for judicial review upon the persons described in IC 4-21.5-5-8.

(b) The copy of the petition required under IC 4-21.5-5-8(a)(1) to be served upon the ultimate authority shall be served at the following address:

Division of Hearings
Natural Resources Commission
Indiana Government Center North
100 North Senate Avenue, Room N501
Indianapolis, Indiana 46204

This address applies whether the commission or an administrative law judge is the ultimate authority.

(c) Where the department or the state historic preservation review board is a party to a proceeding under this rule, a copy of the petition required under IC 4-21.5-5-8(a)(4) to be served upon each party shall be served at the following address:

Director
Department of Natural Resources
Indiana Government Center-South
402 West Washington Street, Room W256
Indianapolis, Indiana 46204.

(d) Where the Indiana board of licensure for professional geologists is a party to a proceeding under this rule, a copy of the petition required under IC 4-21.5-5-8(a)(4) to be served upon each party shall be served at the following address:

Indiana State Geologist
Indiana University
611 North Walnut Grove
Bloomington, Indiana 47405-2208.

(e) Where the Indiana board of registration for soil scientists is a party to a proceeding under this rule, a copy of the petition required under IC 4-21.5-5-8(a)(4) to be served upon each party shall be served at the following address:

Office of Indiana State Chemist
Purdue University
1154 Biochemistry

West Lafayette, Indiana 47907-1154.

(f) The commission and its administrative law judge provide the forum for administrative review under this rule. Neither the commission nor the administrative law judge is a party. *(Natural Resources Commission; 312 IAC 3-1-18; filed Feb 5, 1996, 4:00 p.m.: 19 IR 1323; filed Oct 19, 1998, 10:12 a.m.: 22 IR 750; filed Dec 26, 2001, 2:42 p.m.: 25 IR 1544; filed Aug 29, 2002, 1:03 p.m.: 26 IR 9; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; filed Mar 4, 2008, 12:31 p.m.: 20080402-IR-312070486FRA; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: In 1996, the section reorganized 310 IAC 0.6-1-18. Amendments made in 1998 identified the service address for the Indiana Board of Certification (now "Licensure") of Professional Geologists. Amendments made in 2002 identified the service address for the Indiana Board of Registration for Soil Scientists. In 2008, the address for service of a petition for judicial review upon the "ultimate authority" was changed to reflect the relocation of the Commission's Division of Hearings to the Indiana Government Center North.

A petition for judicial review of a Commission final determination was fatally flawed because it named the Commission as a party but did not name the DNR. Failure to satisfy the statutory requirements of IC 4-21.5-5-7 is a jurisdictional defect. 312 IAC 3-1-18(f) clarifies that the Commission provides the forum but is not a party. The Kosciusko Superior Court granted the DNR's motion to dismiss in *Blue, et al. v. Indiana Natural Resources Commission, et al*., Cause No. 43D01-0710-PL-894. Judicial review from *Rufenbarger & Rufenbarger v. Blue, et al*., 11 Caddnar 185 (2007).

The State Historic Preservation Review Board is a person whose orders are governed by the Commission's rules. "The Natural Resources Commission has adopted a rule, in multiple sections, to assist in the administration of the AOPA as codified at 310 IAC 0.6-1. Reference to the Review Board is contained, for example, in 310 IAC 0.6-1-18." See now 312 IAC 3-1-18(c). *Kandrac v. Hist. Pres. Rev. Bd. and White River Park Dev. Comm*., 7 Caddnar 47 (1994).

312 IAC 3-1-19 Modification of final agency order

Authority: IC 14-10-2-4; IC 4-21.5-3-31
Affected: IC 4-21.5-3-29; IC 14

Sec. 19. (a) A person who wishes to seek modification of a final agency action entered under this rule must file a petition with the administrative law judge and serve a copy upon each party.

(b) Except as provided in subsection (d), the administrative law judge may modify a final agency action only where the petitioner demonstrates each of the following:

(1) The petitioner is not in default under IC 4-21.5-3.

(2) Newly discovered material evidence exists.

(3) The evidence could not, by due diligence, have been discovered and produced at the hearing in the proceeding.

(c) The administrative law judge shall limit any hearing granted under subsection (b) to the issues directly affected by the newly discovered evidence. If an administrative law judge who is not the ultimate authority conducts the rehearing, IC 4-21.5-3-29 and section 12 of this rule apply to the review of the order resulting from the rehearing.

(d) The administrative law judge may, or shall upon the agreement of all parties, modify a final agency action to correct a clerical mistake or other error resulting from oversight or omission. *(Natural Resources Commission; 312 IAC 3-1-19; filed Jan 23,2001, 9:50 a.m.: 24 IR 1613; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: In 2000, the Commission adopted a new rule section to clarify the circumstances and conditions under which an administrative law judge may modify a final agency order.

At IC 4-21.5-3-31, AOPA provides the very limited circumstances in which an agency may modify a final order. *Roebel, et al. v. Vorndran, et al.*, 11 Caddnar 250 (2007).

The Commission's ability to modify a final order generally expires at the earliest of three events described in IC 4-21.5-3-31, "the latest of which is 30 days after notice of the final order is served." *Meyers Subdivision POA v. DNR and Kranz*, 12 Caddnar 282, 290 (2011).

312 IAC 3-1-20 Remand following judicial review or appeal

Authority: IC 14-10-2-4; IC 4-21.5-3-31
Affected: IC 4-21.5-3-29; IC 14

Sec. 20. (a) Except as provided in subsection (b), upon remand following judicial review or appeal, the administrative law judge who previously conducted the proceeding shall resume jurisdiction.

(b) If the administrative law judge who previously conducted the proceeding is unavailable or declines to resume jurisdiction, the division director shall appoint a substitute administrative law judge as soon as practicable.

(c) If the administrative law judge is not the ultimate authority, IC 4-21.5-3-29 and section 12 of this rule apply. *(Natural Resources Commission; 312 IAC 3-1-20; filed Jan 23, 2001, 9:50 a.m.: 24 IR 1613; readopted filed Oct 2, 2002, 9:10 a.m.: 26 IR 546; readopted filed Jul 21, 2008, 12:16 p.m.: 20080813-IR-312080052RFA)*

Annotation: In 2000, the Commission adopted a new rule to clarify that, if available, the administrative law judge who presided during the original proceeding would conduct any needed action following remand from a court. If the administrative law judge who presided in the original proceeding is unavailable, the Director of the Commission's Division of Hearings is authorized to appoint a substitute administrative law judge.